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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON**

|   |   |                               |
|---|---|-------------------------------|
| ELTON HERNANDEZ CASTRO;                   | ) | Case No. 21-00315             |
| KRISTINE NICHOLLE HERNANDEZ               | ) |                               |
|   | ) |                               |
| Plaintiffs,                               | ) | COMPLAINT                     |
|   | ) |                               |
|   | ) | [1] Due Process Violation     |
| v.  | ) | [2] Administrative Procedures |
|   | ) | Act                           |
| ALEJANDRO MAYORKAS, Secretary             | ) | [3] Mandamus                  |
| Of the Department of Homeland Security;   | ) |                               |
| ANTONY J. BLINKEN, United States          | ) |                               |
| Secretary of State; ERIC S. COHAN;        | ) |                               |
| Consul General of the United States, City | ) |                               |
| Of Ciudad Juarez,                         | ) |                               |
|   | ) |                               |
| Defendants.                               | ) |                               |

1 Plaintiffs, Mr. ELTON HERNANDEZ CASTRO (“Elton” or “Plaintiff  
2 Hernandez Castro”), and Ms. KRISTINE NICHOLLE HERNANDEZ (“Kristine”  
3 or “Plaintiff Hernandez”), by and through undersigned counsel, allege as follows:

4 **I. INTRODUCTION**

5 1. Elton is seeking an immigrant visa based on an approved Petition for  
6 Alien Relative (Form I-130) filed on his behalf by his U.S. citizen wife Kristine.

7 Elton attended a consular interview on or about October 7, 2021, at which he was  
8 found inadmissible because he had not received the required vaccinations listed by  
9 the Centers for Disease Control and Prevention (“CDC”).

10 2. Prior to Elton’s consular appointment, he attended a medical exam on  
11 October 5, 2021, with a panel physician designated by the Department of State, as  
12 is required for consular interviews. At this appointment, Elton told the panel  
13 physician that he had not been vaccinated for COVID-19, and the physician told  
14 him it would be required to obtain a visa. However, the panel physician did not  
15 offer to provide Elton with a COVID-19 vaccine or give him instructions on where  
16 he could obtain a vaccine, nor did he indicate that the vaccine was not readily  
17 available. The panel physician told Elton that the Consulate would tell the  
18 physician if the vaccine was not readily available.

19 3. After he was found inadmissible for not having a COVID-19  
20 vaccination, Elton spent several days looking for any location that could provide

1 him with a COVID-19 vaccination. He was staying in Ciudad Juarez for his  
2 consular interview, and was unable to find any vaccines available in the area. He  
3 was finally able to find a clinic who could provide him with the first dose of an  
4 AstraZeneca vaccine, but the clinic was located in Queretaro, Mexico,  
5 approximately 1,000 miles away from Ciudad Juarez. Elton traveled to Queretaro  
6 and on October 18, 2021, he received the AstraZeneca vaccine.

7 4. Kristine has a liberty interest, protected by the Constitution, in her  
8 marriage that gives rise to a right to constitutionally adequate procedures in the  
9 adjudication of her husband's visa application.

10 5. Elton has remained outside the United States as he will need a second  
11 dose of a vaccine between 8 and 12 weeks after the first dose, although he does not  
12 know if or where he will be able to obtain this dose. He is missing work and has  
13 incurred significant expense in obtaining lodging in Mexico and traveling to obtain  
14 the vaccine. The failure of Defendants to have proper procedures in place,  
15 including criteria for whether a vaccine requirement is subject to a blanket waiver  
16 due to its not being routinely available, and the panel physicians bad-faith refusal  
17 to complete his responsibility in determining if the vaccine is routinely available,  
18 has resulted in Plaintiffs' injuries.

## **II. JURISDICTION AND VENUE**

6. This is a civil action brought pursuant to 8 U.S.C. § 1331 (federal question jurisdiction). Jurisdiction is also conferred by 5 U.S.C. § 704, the Administrative Procedure Act (“APA”).

7. Jurisdiction is further alleged pursuant to 28 U.S.C. § 1361. Under 28 U.S.C. § 1361, “[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”

8. Venue is proper under 28 U.S.C. § 1391(e), against officers and agencies of the United States in their official capacities, brought in the district where the plaintiff resides because this is an action where no real property is involved in the action. This case is a civil action in which a defendant is an officer or employee of the United States or any agency thereof, and it does not involve real property.

## **III. PARTIES**

9. Plaintiff Elton Hernandez Castro is a Mexican national who resides in the United States in Spokane Valley, Washington, in Spokane County.

10. Plaintiff Kristine Nicholle Hernandez is a United States citizen who resides in the United States in Spokane Valley, Washington, in Spokane County.

1           11. Defendant ALEJANDRO MAYORKAS, the Secretary of the  
2 Department of Homeland Security (“DHS”), is the highest ranking official within  
3 the DHS. The Secretary is responsible for DHS implementation of the Immigration  
4 and Nationality Act and for ensuring compliance with applicable federal laws,  
5 including the APA. The Secretary is sued in his official capacity.

6           12. Defendant ANTONY J. BLINKEN, Secretary of State, is the highest  
7 ranking official within the Department of State (“DOS”). The Secretary is  
8 responsible for DOS implementation of the Immigration and Nationality Act and  
9 for ensuring compliance with applicable federal laws, including the APA. The  
10 Secretary is sued in his official capacity.

11           13. Defendant ERIC S. COHAN is Consul General of the U.S. Embassy  
12 in Ciudad Juarez, Mexico. He is being sued in his official capacity.

#### 13 **IV. STATEMENT OF FACTS**

14           14. On July 30, 2018, Kristine filed a Form I-130 Family Petition on  
15 behalf of her husband Elton, which was approved on March 22, 2019.

16           15. On November 14, 2019, Elton filed a Form I-601A, Application for  
17 Provisional Unlawful Presence Waiver, and this waiver was approved on April 30,  
18 2021.

19           16. On September 27, 2021, Elton received notification that his consular  
20 interview for an immigrant visa had been scheduled for October 7, 2021 in

1 Mexico. A required medical exam was scheduled for October 5, 2021, 8 days after  
2 the notice of the appointment. The medical exam also took place in Mexico.

3 17. On October 1, 2021, a requirement for a COVID-19 vaccination was  
4 implemented for immigrant visa applicants. Blanket waivers, which would not  
5 require the applicant to file an individual waiver, would be applied where the  
6 vaccine was not readily available.

7 18. Vaccine requirements for immigrant visas are put forth by the Center  
8 for Disease Control and Prevention (“CDC”). These requirements indicate that a  
9 panel physician should consider a vaccine to be “not routinely available” if they  
10 are not routinely available and are not expected to be available within 4 months  
11 following the exam date. Panel physicians are expected to remain informed about  
12 changing recommendations and availability of vaccines.

13 19. The panel physician failed to consider whether the COVID-19 vaccine  
14 was routinely available in Mexico. In fact, the panel physician indicated that this  
15 determination would be made by the Consulate, and was not something the  
16 physician was supposed to address.

17 20. By failing to consider whether the COVID-19 vaccine was routinely  
18 available, the panel physician failed to conduct the medical examination in  
19 accordance with the procedures set forth by the CDC.

1           21. Elton attended a consular interview, where his immigration visa was  
2 denied because he had not received the required vaccinations required by the CDC.  
3 Because he was found inadmissible on this ground, the approved provisional  
4 waiver for unlawful presence did not come into effect, and he was also found to be  
5 inadmissible for having been unlawfully present in the United States.

6           22. Because the panel physician refused to consider whether the COVID-  
7 19 vaccine was routinely available in Mexico, instead indicating that only the  
8 Consulate could make that determination, the denial of Elton's visa application is  
9 not based on a facially legitimate or bona fide reason.

10          23. Defendants' actions caused Plaintiffs emotional and financial  
11 hardship.

12          24. Defendants' actions unlawfully infringe upon Plaintiff Kristine  
13 Hernandez's liberty interest to make personal choices with regard to marriage and  
14 family matters free from unjustifiable government interference in violation of her  
15 right to substantive due process guaranteed by the Fifth Amendment of the United  
16 States Constitution.

17 **V. CLAIMS**

18          Count 1: Due Process Violation

19          25. The allegations contained in paragraphs 1-26 are repeated and  
20 realleged as if fully set forth herein.

1           26. Plaintiff Hernandez has a protected liberty interest in the Consulate's  
2 decision on Plaintiff Hernandez Castro's immigrant visa application.

3           27. The Due Process Clause of the United States Constitution provides  
4 that "certain substantive rights – life, liberty, and property – cannot be deprived  
5 except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Educ.*  
6 *V. Loudermill*, 470 U.S. 532, 541 (1985).

7           28. The freedom to make personal choices in "matters of marriage and  
8 family life" is an established liberty interest protected by the Due Process Clause.  
9 *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (citing *Cleveland Bd. of Educ. V.*  
10 *LaFleur*, 414 U.S. 632, 639-40 (1974)).

11           29. Plaintiff Hernandez continues to suffer from Defendants' legal wrong.

12           30. Plaintiff Hernandez seeks a declaratory judgment that her due process  
13 rights were violated by Defendants when the panel physician failed to consider  
14 whether the COVID-19 vaccine was routinely available, leading to the denial of  
15 her husband's visa application.

16           Count 2: Administrative Procedures Act

17           31. The allegations contained in paragraphs 1-32 are repeated and  
18 realleged as if fully set forth herein.



32. Defendants' finding that Plaintiff Hernandez Castro is inadmissible is the result of the panel physician's unlawful abdication of his responsibility to consider if a vaccine is routinely available, in violation of 5 U.S.C. § 706(2)(A).

33. Defendants' finding that Plaintiff Hernandez Castro is inadmissible constitutes an arbitrary and capricious agency action in violation of 5 U.S.C. § 706(2)(A).

Count 3: Mandamus

34. The allegations contained in paragraphs 1-35 are repeated and realleged as if fully set forth herein.

35. The panel physician failed to conduct Plaintiff Hernandez Castro's medical examination in accordance with the requirements and procedures established by the CDC.

**VI. PRAYER**

WHEREFORE, the Plaintiffs pray that this Court:

A. Declares that the Defendants' actions, policies, and practices as alleged herein are unlawful;

B. Compel the Defendants and those acting under them to perform their duty to conduct Plaintiff Hernandez Castro's medical examination in accordance with the requirements and procedures set forth by the CDC;

1 C. Award damages in an amount to be determined at trial for compensatory  
2 damages and lost wages;

3 D. Grant reasonable attorney's fees and costs of court under the Equal  
4 Access to Justice Act ("EAJA");

5 E. Grant such other and further relief as this Court deems proper.

6 Respectfully Submitted,

7 /s/ Clayton Cook-Mowery  
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